Marquette Law Review

Volume 12
Issue 4 *June 1928*

Article 3

Co-Operative Marketing and Restraint of Trade

Charles L. Goldberg

CO-OPERATIVE MARKETING AND RESTRAINT OF TRADE*

CHARLES L. GOLDBERG

WHAT has once been revolutionary, what has once been new, becomes, by sufficient demand, use, and utility, a standard mode of action.

It is economically sound to say that due to the tremendous strides made by science and invention in the field of commercial pursuits, situations have become far more frequent, complex, and tangled in the commercial world than in the agricultural world. Consequently, commerce as such, has taken "seven league boot" strides onward, while agriculture lagged behind. We need but touch upon some of the legal consequences of such onward movement.

Commencing from the period of the introduction of machinery and the factory system as a result of the overthrow of the feudal system we have engendered such legal institutions as corporations, trusts and combines of various lawful and unlawful natures. As a result of the activities of these structures, there has grown up a tendency to check the ever increasing trend toward combination for the purpose of control of society. Thus there arose the common law restraint against monopolies; and this common law restraint has been so thoroughly imbedded in our law as to be recognized as universally good. It has been crystallized into our state and federal legislation under various names and guises, particularly under the Sherman Anti-Trust Law and the Clayton Anti-Trust Act. We, in Wisconsin, have section 133.01 that declares the public policy of the state to be:

Every contract or combination in the nature of a Trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, to be produced or sold therein or constituting a subject of trade or commerce therein, or which combination, conspiracy, trust, pool, agreement or contract shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state, or fix any standard or figure in which its price to the public shall be in any manner controlled or established, is hereby declared an illegal restraint of trade.

The same general provisions are found in all the states of the Union.

It is apparent, without going further into the subject, that the common law rule of freedom of contract has an exception, namely such contracts as are in restraint of trade.

* Thesis submitted in partial fulfillment of requirements for degree of Juris Doctor.

It is common knowledge that commerce and agriculture go hand in hand; that one is the raw material for the other. The basis of our country's prosperity lies in an harmonious dealing of one with the other. However, it seems as if agriculture did not keep pace with the modern methods of production and marketing. It is but recently that we find a tendency among farmers and agricultural people in general to remedy the situation by pooling their products and forming what might be called "combinations." There is no exception in the common law rule against restraint of trade in favor of agriculturalists and the problem arises; are or are not these combinations of farmers, these combinations of the producers of agricultural products to be declared legal or illegal? To quote from the *Columbia Law Review*.[1]

Co-operative marketing has found its way into the legal digest in the garbled form of an exception to an exception. The rule is Freedom of Contract, the exception pertains to restraint of trade; and the exception to the exception is the freedom of farmers to combine in co-operative societies. An exception to an exception does not work exactly like a rule. We must not expect, for example, to find the law laying out a plan and offering a device under which farmers can work together in the task of the marketing of their products. We must rather be satisfied with mere permission to use the corporate form of organization and the form of contract when, as, and if, they meet the farmers' needs.

Historical Development

Perhaps the very first intimation of definite co-operative marketing idea that can be pointed to, dates back to the organizing of the Miami Exporting Company,[2] organized in 1803. It had for its corporate purpose the finding of markets for the agricultural products of the state. A trifle later we find records of the Welch Liebnig Exporting Company,[3] organized in 1820. It, likewise, was organized by farmers for the purpose of marketing their products. These companies were the forerunners of the present co-operative movement and dispel the prevailing idea that the co-operative marketing movement is a by-product of our day and age. The idea is neither new nor novel. The form, however, has greatly changed since the days of our forefathers.

In 1844 we find an attempt to foster the co-operative movement by the Protective Union—which organization attempted to abolish profits and sell merchandise to their members at cost. The underlying theory of the movement seemed to be the injustice of profit. The idea was

[1] Vol. 28, No. 3.

[2] Ohio Ag. Experiment Station, Bulletin No. 326. Nourse, "Legal Status of Agricultural Co-operation."

[3] Ohio Ag. Experiment Station, *Ibid.* Nourse, *Ibid.*

more the outgrowth of a workingman's union than a distinctive reform in marketing.

The whole union movement of 1850 and the following year in New York, Boston, and Pittsburgh was permeated with the idea that co-operation offered the best mode of protection to workmen and the ultimate means of solution for the problems of labor, the revival of business activity during the years 1853-1854 brought forth a new type of union.[4]

These, and later attempts made use of the legal devices already at hand. Some employed the form of a corporation organized under general enabling acts. Stocks were issued, boards were elected and in general the existing machinery of the law was made to perform a new duty. Others merely associated under the common law device of voluntary associations.

The first stirring of the co-operative movement in the United States did not leave behind any reminder of itself on the pages of our statute books. In some cases these commercial activities were simply taken up by trade unions or other bodies not organized for profit.[5]

The movement grew and became more widespread, especially under the influence of the National Grange of the Patrons of Industry, commonly called the Grange. The Grange was a nation-wide organization somewhat in the nature of a trade union, but had as one of its objects the organization of the farmers. Local units sprang up among agriculturalists with co-operation as their goal. While at this time (around 1875) it was too late for any scheme of organization to save the Grange from industrial death, the principles it advocated were deeply imbedded in the local farmer units. The most salient of these was that each member was to vote as a *man,* not in proportion to the number of shares he held. Now then, since the farmer pools were for the most part organized under the general corporation laws, such a result was in some instances impossible. Moreover, there appeared to be growing opposition by independent industrialists, to pools; and the attacks on them were made on the common law monopoly rule. Furthermore, the existing form was unsatisfactory because members of the pools could violate the agreement and if any recovery might be had at all, it merely consisted of money damages.

There was also a desire to prohibit other associations from using the term "co-operative." Today we find in Wisconsin, Sec. 185.22, making it a misdemeanor for those not authorized to use that term. It was also felt that financial aid would ultimately be forthcoming should the state specifically recognize the co-operative as a district unit.

---

[4] Nourse, p. 28, *Ibid.*
[5] Nourse, 29, *Ibid.*

Thus, the farmers appealed to the legislatures for aid. The first co-operative marketing law was passed in Michigan in 1865 which allowed the establishment of co-operative stores, but in 1875 it was amended to include agriculturists. Pennsylvania followed in 1868, Minnesota in 1870 and Wisconsin and Kansas in 1887.[6]

These early statutes included merely the fundamental principles of the Grange and provided for (1) the one man vote; (2) limitations on capital holdings; (3) distribution of profits in pro rate to business done with the association.

From thence forward the movements of legislation have been rapid and changing. It soon was recognized that co-operative marketing could not be run on the basis of a business making profit; that in some instances the presence of common stock was an inducement for the managers to direct their attentions more to the payments of dividend, than to adequate handling of the produce. It became apparent that dividends could not and did not represent the worth or selling price of a farmer's product, but were in reality a profit of a business.

There appeared the non-stock association. In 1895, the California Non-Stock Law supposedly fostered by the Farmers' Alliance, was passed. It followed in structure the fraternal association idea of England. In 1909 Alabama followed with a like law; and Wisconsin in 1911, amended in 1921, 1925 and 1927. Today practically all the states have non-stock laws on their books.

The general purpose of all of these non-stock laws was merely to allow co-operatives to organize under a special form of business unit. Very few of the newly passed statutes made any mention of public policy—very few of them intimated that the enabling law was to be protection against the attacks on subsequently organized pools because of restraint of trade. It was not until much later that such definite declarations were made, and not until after the question had been thoroughly stirred up in litigation.

Legality of the Unit

The nature of the marketing associations is to be determined from the prevalent ideas of those who organized them. As previously mentioned, the prevalent idea in the minds of the members was that justice could be done only by combining to protect their product prices from the organized purchasing power of corporations and "gentlemen's agreements" of independent buyers.

Regardless of the economic viewpoint, the organization of the associations involved an attempted fixing of prices and an attempted control of markets. By limiting the dealings to their members there

[6] Nourse, *Ibid.*

can be no question but that technically they were violating the common law rule of freedom of conduct.

While the pools were organized primarily to combat what they considered the "trusts power," the attack on them was based on the theory that they themselves were conspiring to restrain trade. The above noted objections were strongly urged against the pools and, in most of the early cases, successfully so. The early cases on co-operative marketing recognized no distinction for a proper constitutional classification between farmers and others. They, in effect, declared that any attempted restraint of trade, any combination that had control of otherwise free acting agencies as its good, was a violation of the rule against monopoly.

At this point it might be well to point out the trend of Federal and state legislation on the question of monopolies. In 1890 the Sherman Anti-Trust Act was passed—the provisions of which are familiar to all in the profession. It was apparent even at this time that the issue of farmer co-operation would sooner or later have to be faced. Thus an amendment was proposed to the act as follows:

Provided that this act shall not be construed to apply to any arrangements, agreements or combinations between laborers made with a view of lessening the number of hours of their labor or of increasing wages; nor to any agreements, arrangements, associations or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of their own agricultural or horticultural products.[7]

The bill with the amendment was referred to the judiciary committee but was reported out without the amendment. The Sherman Anti-Trust Act was passed without an exception in favor of agriculture.

Many of the states immediately wrote into their statute books acts similar to the Sherman Act. Illinois was among the leaders in 1891. The Wisconsin provision is quoted earlier in this paper.

In a relatively short time after the passage of the Sherman Act and the Illinois Act a case directly involving the questions we have been discussing came before the court.[8] The facts are, that within the immediate vicinity of Chicago some 1,500 producers of milk combined informally into an association for the purpose of negotiating a price with the milk dealers. The association in its declared purpose was organized to obtain "a just return for the sale of same; to rid the field of city distribution of irresponsible and dishonest dealers; to establish a central bureau of information for the shippers' benefit, etc."

---

[7] *Congressional Record*, 51st Cong., 1st session, p. 2726, Nourse.

[8] *Ford* v. *Chicago Milk Shippers' Assoc.*, 155 Ill. 166, 39 N.E. 651 (1895).

The Illinois Court, however, held this was a combination in restraint of trade, that regardless of its stated purpose, it was organized "to control the price of the purchase and sale of milk to retail dealers within the limits of the city of Chicago"; that its members "carry out a scheme which is a combination, agreement or trust by which they fix the price on an article of merchandise and limit the amount to be sold." The decision in this case was followed consistently for about twenty years.

In Texas an attempt was made, when passing the Anti-Trust Laws, to exclude the Farmers' Co-operative Association from its operation. In the case of *In re Grice*[9] the court held the statute in question unconstitutional on the grounds that it violated the constitutional prohibition against taking property without due process of law and also because the statute denied to citizens the equal protection of the laws. In the Grice case no Farmers' Co-operative Marketing Association was involved and this fact may account for the failure of the court to realize the fact that a proper classification may be made of such associations. The court says:

This Statute under discussion is clearly class legislation and discriminating against same and favoring others. We are familiar with the duties of the farmer and the cares and trials of his business life and appreciate highly the customary compliments paid by mankind to the rural yeomanry of the land. Yet what is there about all that to entitle him to the privilege of combining in restraint of trade as to those articles he produces, while his neighbors, the storekeepers and mechanics are precluded therefrom. This law, that deprives the citizen of his rights of contract and that seeks to divide citizens not exactly by the calling they follow, but by the source of the property they hold and exempts 80 per cent of them from the penalties it visited upon the remainder, is not sustained by any good reason or excuse; it is not just, it is utterly without the support of the law, is vicious class legislation depriving citizens of his constitutional right of life, liberty and property without due process of law, contrary to the law of the land; and is therefore declared to be null and void.

The Grice case was closely followed by the famous Connoley case (1902)[10] and the United States Supreme Court again went on record as allowing no exemption to agriculturists who combined, if such combine constituted an attempted restraint of trade. The facts were as follows: The Union Sewer Pipe Company—an Ohio corporation —did business in Illinois with the defendent Connoley, who gave the plaintiff the notes being sued on. The defense, in essence, consisted of the fact that the plaintiff was a combination in the form of a trust in restraint of trade and commerce and doing business as such

[9] 79 Fed. 629 (1897).
[10] 184 U.S. 540, 22 St. Ct. 431.

in violation of the provisions of the Illinois Anti-Trust Act. The answer to the defense set up that the Illinois act was unconstitutional because it exempted from its operation agricultural products or live stock while in the hands of the producer or raiser. The court in upholding the replication of the plaintiff restates the generally known principle that in order to maintain a statute which is discriminatory, the distinction between the classes affected must be based upon an inherent difference in those classes.

It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon reasonable ground—some difference which bears a just and proper relation to the attempted classifications,—and is not a mere arbitrary selection.

The court, however, seems to be unable to justify the attempt of the Illinois Legislature to place agricultural products on a different basis than other producers. They say:

It may be observed that if combinations of capital, skill or acts in respect of the sale or purchase of goods, merchandise or commodities, whereby such combinations may, for their benefit exclusively control or establish prices are hurtful to the public interest and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products are not also hurtful. . . . . To declare some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations, ... and that others of the same class shall not be bound to regard those regulations . . . . is so manifestly a denial of the equal protection of the laws that further argument would seem to be unnecessary.

This case, in somewhat strong language, commits the court to the rule that producers of agricultural products are not entitled to immunity as a special class, nor do they as such constitute a *reasonable basis* for a constitutional classification. Yet in the Connoley case Justice McKenna writes a well reasoned dissenting opinion—an opinion which was later destined to be the better view of the law.

In neither of the last two cases was a co-operative association directly involved. Both controversies dealt with the interpretation of state anti-trust statutes which exempted from their operation combinations of agricultural producers. We now turn our attention to a few leading cases which directly involve farmers' marketing associations. It is not unreasonable to say that the weight of the foregoing cases materially guided and ruled the courts in their decision on those following.

It was at about this time (1910-1915) that the country's agricultural interests took on an added impetus in the field of co-operation.

The gradual development of the associations, in spite of legal attacks, brought about a realization that the heretofore loose corporate association could not bring about the desired results unless there were inserted into the contracts of the members machinery providing for its enforcement. Heretofore the organization had been based on the assumption that members would deal exclusively with the association because, in most instances, the return to the member depended upon the amount of business transacted with the pool. With the advent of the non-stock association, however, the method of computation was charged to net return of the sale of each producer's product. Consequently the enforcement weapon of the pool was gone; if the member by chance or through the intermeddling and bribery of an independent buyer sold his product outside the pool, no method remained for the association to repair the wrong. Manifestly, money damages were not adequate, for money damages would not insure the continued existence of the associations. Consequently as a means of insuring permanent support and giving the necessary stability to farmers' organizations, the penalty clause was inserted into the farmers' contracts. Generally this "maintenance clause"[11] took the form of a definite price per unit sold outside the pool as liquidated damages. The attack on the pools then had two fronts—for the "maintenance clause" was regarded as a penalty and as additional definite evidence of the tendency of the pools being conspiracies in restraint of trade.

In 1913 the question was presented to the Iowa Court in *Reeves* v. *Decorah Farmers' Co-operative Association.*[12] The plaintiff was a local hog buyer and his complaint stated that the defendant company was so organized as to drive him from the field of competition. One of the by-laws of the society read as follows:

> In order to insure future success and prosperity of this society its members and shareholders are required to sell all their marketable produce and live stock to the society. Any member or stockholder who may prefer to sell his produce or live stock to a competitor in this market shall forfeit to the company and pay over to its treasurer from the proceeds received from produce or live stock so sold to other firms or competitors the amount as follows: five cents for every hundred weight sold to any competitor.

The local hog buyer requested, and obtained, an injunction restraining the association from collecting the penalty on the ground that such a contract was in restraint of trade and illegal as a violation of the Iowa anti-trust laws. After quoting at length from the anti-trust statutes the court reviews a number of cases which uniformly held combinations illegal.

[11] Term adopted from Nourse.

[12] 160 Iowa 194, 140 N.W. 844.

Without reference to this chapter (referring to anti-trust laws) monopolies have always been odious at common law, and *all* contracts, arrangements or agreements in restraint of trade or of free competition were void. . . . . As a rule a contract which creates such a monopoly as to put it in the power of such combination to raise or lower prices is invalid. (Cases cited). . . . .

Whilst originally all contracts in restraint of trade were illegal, some exceptions were introduced into the common law, and the rule now seems to be that such contracts are not illegal save when unreasonable in character and that where incident or ancillary to some lawful contract, as between vendor and purchaser, partnership, employer and employee; and not unreasonable in their scope or operation, they are not illegal.[13]

This court then, held that a combination of farmers for the purpose of marketing their products through an agency of their own was "unreasonable in character." The Reeves case was widely discussed and followed in numerous state courts through the country.

Shortly after the Reeves case the Alabama court handed down a decision closely following the lines of the Iowa court. The case (*Georgia Fruit Exchange* v. *Turnipseed*)[14] also involved a situation wherein an independent buyer, feeling aggrieved at the condition of the market due to the co-operative movement of the producers, attacked that association on the identical grounds used in the Decorah case. The court then said:

It cannot be fairly doubted but what the parties to the contract contemplated that this protected market and resilient enhanced price was to come only as a consequence of plaintiff's success in subsequently procuring or securing other peach growers, in such numbers as, with dependent would amount to the producers of at least 60 per cent of the peach crop to . . . . pledge plaintiff the absolute right to handle their fruit crop. Plaintiff thereby became master of the situation, so far as regards the sale and disposition of at least 60 per cent of the peach crop of the country . . . . and would remain such master as long as the parties, defendent and the other required number of growers kept their contracts with the plaintiff to market their crop through it. It gave the plaintiff a commanding position in fixing the prices of peaches in this section of the country. It could direct the market to which any shipment would go and withhold from any market all shipments or limit the supply at a particular market, thus forcing up the price. It is clear that the real design was to stifle and destroy at the various markets competition between defendent and other growers who became members of the pool by allowing the plan to direct the crop from the channels of trade in which it would have ordinarily flowed if each grower had been left to act independently and to choose his own market,

[13] *Montague* v. *Lawry*, 193 U.S. 38, 24 Sp. Ct. 307. *Moore* v. *Bennett*, 140 Ill. 69, 29 N.E. 888. *Hoover* v. *Graves*, 7 Bing 73F. *Jayne Co.* v. *Turner*, 132 Ia. 7, 109 N.W. 307.

[14] 9 Ala. App. 123, 62 So. 542.

and to so direct the shipments of these several growers as to avoid competition between them at the markets where they before competed.

The Alabama case quoted extensively from the Ford Milk case and apparently was guided by the decision therein. As late as 1918 these two cases were followed by the Colorado court in *Burns* v. *Wray Farmers Greens' Company.*[15]

It was at about this time that there appeared to be a changing attitude in some of the courts toward co-operatives. In Castorlane Milk & Cheese Company[16] it was held that a penalty of $2.00 per cow per year for failure to deliver milk to the association did not constitute such an unreasonable feature of a contract as to render it in restraint of trade. The court, without reference to any of the cases above referred to, says: "I cannot see how the agreement in any respect offends the law as being a monopoly and an unreasonable restraint of trade."

In *Bullnille Milk Producers Associations* v. *Armstrong,*[17] also a New York case, the agreement provided for $10.00 per cow as liquidated damages. The court:

It seems to me that the agreement in question constitutes a valid and binding contract and is not void as against public or restraint of trade. . . . . It was quite necessary that they be assured of continued patronage of their members in order to justify the association in going to the expense of acquiring or erecting a creamery. It cannot be said that an agreement such as this would tend to restrain trade or stifle competition; on the contrary, it seems to me that it encourages competition by bringing a new creamery into being.

The changing attitude is well shown by the situation that developed in Kentucky. The tobacco interests in Kentucky secured the passage of a special statute in 1906, the first section of which was:

It is hereby declared lawful for any number of persons to combine, unite, or pool any or all of the crops of wheat, tobacco, corn, oats, hay or other farm products raised by them, for the purpose of classifying grading, storing, holding, selling or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might obtain or receive by selling said crops separately or individually.

The second section provided that contracts which are entered into for the purpose of carrying out the above idea are not to be declared invalid or illegal.

It is difficult to see just why the manner or enactment of a special statute covering the subject is of any more force and effect than a

[15] 65 Col. 425, 176 P. 487.
[16] 179 N.Y.S. 131.
[17] 178 N.Y.S. 612.

declaration in an anti-trust statute which expressly exempts co-operative agricultural associations. Both methods of procedure are certainly declaratory of the intended public policy of the state. Both methods involve the same questions of construction and constitutionality. *Yet* the Kentucky court, when the question was directly presented to them in Owen County, *Burley Tobacco Society* v. *Brumack*,[18] held that the statute was not in violation of the anti-trust acts, but was a legitimate classification. The defense insisted that the statute in question violated the Fourteenth Amendment in answer to which the court said:

> This section has been frequently considered by the Supreme Court of the United States and it has ruled that it does not deny the state to classify professions.

The opinion of the court is remarkable for the fact that very little time is spent in discussing technical restraint of trade. The weight of the opinion is devoted to an inquisition of the "reasonableness of the price."

In an earlier opinion the Supreme Court has noted the fact that not all combinations in restraint of trade are illegal. Only those which are unreasonable are invalid. With the case made exception in mind, the court proceeds:

> It would seem that trusts, pools, and combinations, the only purpose of which is to obtain a fair and reasonable price for an article are permitted. . . . . If the act of 1906 . . . . owners were to place the price of crops above *their real value* it would clearly be a violation of the constitution.

The case presents a very interesting question. The anti-trust statutes declare restraint of trade illegal, i.e. the *structure* if unreasonable is sufficient to indict and stigmatize the entire situation. In this case, the court judges the unreasonableness of the restraint of the *result.* It clearly intimates that as long as the pool obtained no price higher than the "real value" (a very difficult and elusive thing at best), the mere fact of an illegal structure is not sufficient to impeach it. The decision impliedly recognizes the underlying principle that a state may change its public policy, yet limiting that change to cases involving proper classification.

In rapid succession followed the cases of *American Seed Machinery Company* v. *Commission*[19] and *Commission* v. *The International Harvester Company of America*,[20] which held that despite the fact that tobacco associations were held legal regardless of their raise in prices which almost doubled and trebled their original prices in some in-

[18] 128 Ky. 137, 197 S.W. 710 (1908).
[19] 152 Ky. 589, 153 W. 972.
[20] 131 Ky. 551.

stances, the companies in question were condemned and fined as violating the anti-trust statutes.

The American Seed Machinery Company and the International Harvester Company were held in the lower courts to be combinations in restraint of trade even though the test laid down was unreasonableness in the price, not in structure. The ruling in these two cases, however, was reversed in *International Harvester Company of America* v. *Kentucky*.[21] Interpretation of the lower courts of Kentucky interpreted the anti-trust statute to hold that such statute prohibited trusts or combinations to form for the purpose of selling articles of the companies at a price in excess of their real market value.

The plaintiff was prosecuted and fined for combining under the laws with other companies and was charged for selling their machines above their real market value. The United States Supreme Court said in the above named case:

When the Court of Appeals came to deal with the act of 1891 (Anti-Trust Act), the constitution of 1891 (by which it was made the duty of the legislature to prohibit trusts from lowering or raising prices below or above their real value), and the act of 1906 (which exempted farmers from the operation of the act) had reached the conclusion . . . . that by interaction and to avoid the question of constitutionality they were to be taken to make any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article.

The plaintiff contends that the law has construed offers no standard of conduct that is possible to know.

The court then answers the proposition that according to the rulings of the lower court the rule by which they are to be governed is "the market value under fair competition and under normal market conditions." The court then indulges in a contemplation as to whether the rule laid down is real or illusionary and arrives at the conclusion that a combination invited by the law, to organize cannot be expected to guess at its peril, what its products would have sold for if the combination had not existed. That is expecting too much of human ingenuity. Consequently, by the decision of the United States Supreme Court the practical effect of the anti-trust laws was nullified, for if it be impossible to judge what is a combination in restraint of trade, there is no real excuse for prosecuting one for a mistake in judgment.

After the decision of this case, the Kentucky court then held as did the majority of her sister states, that farmers who sell their crops under the guise of combination and restraint of trade are no more to be favored than any other like combination.[22]

[21] 234 U.S. 216, 58 L.E. 1284.

[22] *Gay* v. *Best*, 166 Ky. 833.

THE STANDARD MARKETING ACT

Mr. Sapiro, doubtless the outstanding figure in the co-operative field, felt that the attitude of the courts was crystallizing a public policy, which to say the least would be detrimental to the life of such organization. He felt it incumbent upon him, for the benefit of the associations he represented, to have legislative sanction of the theory of marketing he expounded. As a result of Mr. Sapiro's endeavor there appeared the Standard Marketing Act.

Mr. Sapiro had been actively engaged in the organization of the associations in California and in Oregon, and, as a result of such experience, there was presented to the Texas Legislature an act which embodied the essential requisites necessary to the continued operation of pool activities. The measure was passed in substantially the form tendered and shortly thereafter the standard act was embodied in the statutes of the states of Arkansas, Idaho, Arizona, Kansas, Montana, North Carolina, North Dakota, and Georgia.

In 1922 the famous Bingham Act, perhaps the most severely litigated of all, was enacted in Kentucky. By 1924 practically every state in the Union had added a co-operative marketing act upon its books.

The principles embodied in Mr. Sapiro's act included a lengthy statement of its purpose which while not essential to its validity, had the function of informing the courts and legislators of the meaning and interest of the act.[22a]

Thus, Section (1) of the Act was as follows:

In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this act is passed.

Part of Section 5 of the Bingham Act reads:

. . . . and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind unscientific and speculative selling of crops; and that for this purpose farmers should secure special guidance and instructive data from the dean of College of Agriculture of the University of Kentucky.

There is, then, an attempt to impress on the jurists that the farmers are a proper basis for classification—that the act is not discriminatory but aims toward the well being of the state . . . . that the public have a vital interest that is being guarded by this act.

Immediately, in the states that adopted the Standard Act, litigation forced it into the courts for interpretation . . . . and let it be said

[22a]Nourse, *Ibid.*

for the honor of Mr. Sapiro's work, that in the great majority of cases, the courts, contrary to their previous holdings, upheld the legislation as proper and beneficial.

In *Hollingsworth* v. *Texas Hay Association*[23] the question was raised as to whether an association incorporated under the Texas act and using a "maintenance clause" in its contract was a combination in restraint of trade. Briefly the court disposed of the contention saying:

By Sec. 26 (of the Anti Trust Statutes) it is explicitly provided: "No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly or an attempt to lessen competition. . . . ." We know of no constitutional reason why the public policy of the state may not be so declared.

In 1921 the Supreme Court of Oregon passed on the question in the case of *Oregon Growers' Co-operative Association* v. *Lenz.*[24] The Oregon Act allowed co-operators to stipulate for liquidated damages in their by laws and provided for specific performance and injunctional remedies in their members contracts. In an action by the pool against one of its members, the validity of the law was attacked. The court, however, upheld the constitutionality of the statute. It should be borne in mind that the court here was dealing with an association which had embodied in its by laws very strict and ordinarily unenforceable remedies. There is no doubt but that at common law the association would have been condemned as an illegal restraint of trade. Its contracts with its members would have been declared ancillary to that vicious purpose and would undoubtedly be unenforceable.

The decision of the court is a fine exposition indicating the general change in public policy and unequivocally recognizing the right of the legislation to change such public policy.

On April 12, 1923, the Supreme Court of North Carolina handed down its decision in the famous case of *Tobacco Growers Co-operative Association* v. *Jones.*[25] The opinion was later widely quoted and considered perhaps the ruling case up to a few months ago. Perhaps it would be best to set forth the words of the court itself in dealing with the question of interpreting the standard co-operative marketing act in regard to the restraint of trade. The court said:

It is clear that there is nothing in the statute to enable the producers to combine to sell their products at a profit beyond what would be a fair and reasonable market price. Indeed this would be impossible on the part of the producers as only a part of them would in any event belong to such an organization; whereas the manufacturer of tobacco being in

[23] 246 S.W. 1068 (1922).
[24] 107 Ore. 561, 212 P. 811.
[25] 1858 N.C. 265; 117 N.E. 174 (1923).

comparatively a few hands, the buyers could combine as they have done for many years in a so-called "gentlemen's agreement" . . . . with the well known result that the producers of tobacco, the farmers, have received the bare cost of production . . . . while the combination of tobacco manufacturers have accumulated vast fortunes.

In view of the necessity of protecting those engaged in raising tobacco against the combination of those who buy the raw product at their own figures and sell it to the public at prices also fixed by themselves, this movement has been organized. By a careful examination of all the provisions of the act under which the Association is acting, it will be seen that every precaution has been taken to insure that it will not be used for private gain . . . . but to protect the tobacco producers against oppression by a combination of those who buy and not to authorize, and does not empower those who produce the raw material to create a monopoly in themselves.

Indeed it seems to us plain that the plaintiff under the provisions of its charter is not and never can become a monopoly for many reasons: (1) As a corporation of North Carolina the moment it should become dangerous to the public, if that were possible under the terms of its charter, the General Assembly can at any time repeal its charter; Constitution, Article VIII, Section 1; and the courts will intervene to prevent it becoming a monopoly. (2) The plaintiff has neither capital stock nor surplus; nor credit except as given it by the statute and this latter may be withdrawn at any time. It is wholly dependent upon its ability to borrow in large sums which is necessarily under the control of the Federal Reserve Banking system and the moment it shall deny credit to the plaintiff its sufficiency would be destroyed. It can borrow from the Federal Reserve system, which is a function of the Government only on such terms as that Board deems consistent with the public welfare and the Board will not permit hoarding or monopolizing by the plaintiff.

The plaintiff will continue to exist only if it provides for a normal, orderly, marketing of the tobacco crops and by putting on the markets of the world annually the production for that year. Its sole purpose is by an orderly marketing of the crop to make large savings and to secure to the producers a fair and reasonable price therefor without increasing the price the consumer will pay for the manufactured article. The sole object of the association is to protect the producer of the raw articles from depression in the price by the combination of the large manufacturing corporations controlled by a few men who can at the same time not only decrease the price to the producer, but can increase it at will to the consumer and thereby accumulate in a few hands sums beyond computation. The Co-operative Association purposes to eliminate unnecessary expenses in selling and to prevent artificially forced reduction in the price paid to the producers. Instead of creating a monopoly, the object is by a rational method of putting the raw product on the market from time to time as there is a legitimate demand for its manufacture, and by the extension of credit to farmers to enable this to be done, to prevent a monopoly of the tobacco industry by those who manufacture it.

Thus it seems that the object of the co-operative law is to pro-

tect farmers from unfair practices by combination of produce buyers. The statute is held valid not in spite of the restraint of trade, but on the ground that no unfair monopoly or unfair prices result. The court takes the logical viewpoint and it may be inferred from this opinion that it should be shown definitely that unfair prices have been obtained in an artificial market any association, pool or combine, which produces this situation, would be as amienable to the anti-trust laws as any other conspiracy in restraint of trade. It will be noted that the standard act provides in section 1 for a "distribution of agricultural products between consumer and producer as direct as can be efficiently done and to stabilize the market of agricultural products," and in section 5, "A more direct system of marketing in the substitution of merchandising for the blind unscientific and speculative selling of crops." The distinction drawn in these and other cases to follow seems to be that whereas the states may not exempt from the operation of an anti-trust statute a class of people, that is, exempt farmers and farmers' produce from liability under the conspiracy to restrain trade, the state may nevertheless declare its public policy to be that combinations or associations of farmers for the purpose of marketing their products are not conspiracies, but rather a mere method of producing orderly marketing in the place of chaotic uncertain speculations. No one may combine to restrain trade, that is, no one may conspire to restrain trade, not even farmers. But farmers may combine for the purpose of orderly marketing and it seems to be the declared public policy that such combination is not to be considered a conspiracy in restraint of trade. The distinction is hair fine, but is now the law of the land.

To continue with the case law on the subject, we find case of *Kansas Wheat Growers' Association* v. *Schulte*[26] and the same *Association* v. *Charlet*.[27] In the latter case the court says:

Defendant says the court found the contract was made for the purposes of obtaining wheat, keeping it off the market, and putting it in a pool to raise the price of wheat. What the court did was to describe the association as an organization of wheat growers associated together to pool their wheat and withhold it from the market until such a time as the association desired to sell. The Court made no finding of purpose or practice, and, in view of the minute findings which it did make, could have had no competent evidence before it of purpose or practice contravening the great public policy which the Legislature sought to promote by the Co-operative Marketing Act.

Very shortly after the decision in the Schulte case the Supreme Court of Missouri in *Brown* v. *Staple Cotton Co-operative Associ-*

[26] 113 Kansas 672, 216 P. 311 (1923).
[27] 118 Kansas 765, 236 P. 657 (1925).

ation[28] joined the ranks of those courts who declared themselves to be in favor of a liberal interpretation of the anti-trust statute in reference to agricultural associations. In an elaborate decision reviewing the Missouri constitution with special reference to the section commencing "The Legislature, to enact laws to prevent all trusts, combinations, contracts and agreements inimical to the public welfare" the court said:

> . . . . putting the question differently, is this contract to be condemned even though it be not inimical to the public welfare? We think this question is answered in the negative by following decisions in this court; (cases cited) Chapter 88, Laws of 1900, defining trusts and prohibiting contracts in restraint of trade, ... tests the essential of its existence in that the contract or combination be on account of its actual *results* obnoxious to the public policy or be in itself in its necessary effect inimical to the public welfare. . . . . The legislature must be given credit if language of the statute in question will permit of legislating in the public interest. It is inconceivable that it was intended by our Anti-Trust Statute to condemn any and all contracts between two or more persons which might have the effect of hindering the freedom of trade even to the smallest extent. Such a construction, as it will be seen at once, would lead to absurd results. It would destroy to a large extent, the public welfare instead of promoting. . . . . It would be hard to conceive of how a steady market and a reasonable and a profitable price for cotton to the producer would be inimical to the public welfare in this state. On the contrary it would appear that not only every cotton producer in the state would be benefitted thereby, but also every other person engaged in any kind of business whatsoever.

We now turn to one of the most leading and prominent cases in the country and decided by the Supreme Court of Wisconsin[29] in 1923. It might be well to review the situation leading up to the case in question. It is common knowledge that in 1921 tobacco growers suffered extremely from severe market fluctuations. Early in the buying season tobacco was held for forty or more cents per pound on the fields. Later in the same buying season the farmers were forced to dispose of their crops at prices varying from six to ten cents per pound. Tobacco buyers, while not efficiently organized, constituted in the main of a few powerful firms whose policy it was to deal and bargain with each farmer individually. As a result of the hardships and losses resulting from this complicated, unsatisfactory and unstable market, there was organized the Northern Wisconsin Co-operative Tobacco Pool, which, after its organization, had under contract 75 per cent or more of the growers of tobacco in Wisconsin. Its standard contract by which these members were bound to the association,

---

[28] 132 Miss. 859, 96 So. 849 (1923).

[29] 182 Wis. 571, 197 N.W. 936 (1923). *Northern Wisconsin Co-operative Tobacco Market Association* v. *Bekkedal.*

provided for a penalty of five cents per pound for all tobacco sold to others than the pool. It was organized under chapter 185 of the Wisconsin statutes. One Bekkedal, by his agents, solicited farmers who were members of the pool to sell their crops to him in violation of their agreement with the pool. The action, under review, was instituted by the association for an injunction restraining the said Bekkedal from interfering with the members of the pool and restraining him from interfering with the established contracts. It was contended by Bekkedal, the defendant, that the Wisconsin Tobacco crop was peculiarly subject to monopolization because of its distinct quality; that the plaintiff pool established a price upon its crop which was a monopoly price; that the plaintiff acquired such monopolized control of the tobacco crop in Wisconsin as to be able to disorganize, in its first season, the entire distribution and marketing system of tobacco in Wisconsin. The court said, assuming these several averments to be true:

It is to be conceded that for a long time the public policy of this state was in accordance with this statute declaration (referring to Sec. 1747e the Anti-Trust Statute). Probably such would have been the public policy of this state in the absence of such statute declaration inasmuch as the statute in question adds very little to the condemnation visited upon such agreements at common law. It is not to be denied, however, that the public policy of the state with reference to combination and agreements is within the control of the legislature and that such public policy is subject to legislative control and modification.

. . . . If in the course of time changing conditions should give rise to economic views and public opinion, wiping out the prejudice hitherto entertained with reference to such combinations, and they should come to be regarded as beneficial rather than injurious to the public interest, there is no doubt of the power of the Legislature to completely reverse the public policy of the state with reference to such combinations and agreements and to promote rather than suppress the same. So, also, if the Legislature should conclude that some combinations are injurious while others are beneficial to the public interest, no reason is perceived why the injurious combinations may not be prohibited and the beneficial combinations encouraged, due regard being had, of course, to the legal requirements concerning proper and germane classification.

The court in recognizing the fact that agriculture is a distinct and proper basis for constitutional classification proceeds to point out that the first section of the co-operative law of the state provides that any number of adult persons, not less than five, may organize as a co-operative association. It seems to the writer, however, that the designation in the statute five adult persons does not extend the statute beyond agricultural commodities and that the five persons mentioned are merely an indication of the number of farmers who may

join for the purpose of organizing an association to market their products. The court continues:

. . . . We therefore hold that the validity of the plaintiff organization and its operations must be tested, not by the former public policy of this state with reference to combinations and agreements in restraint of trade, as declared by section 1747e, but by the provisions of the co-operative association statutes. So far as the contract is concerned, it seems to be in conformity with those provisions. The statute specifically provides that any number of persons may organize as a co-operative association. This language negatives any legislative purpose to limit the number of persons that may so organize, and the fact that 75 per cent or even 100 per cent of the tobacco growers of the state affiliated with this association does not render its organization illegal or its operations unlawful.

The Bekkedal case has been very widely quoted and established without a doubt the validity of the standard marketing act as advocated by Mr. Sapiro in its present Wisconsin form.

Reference has been made to several Kentucky cases earlier, in which the state courts have upheld the classification of farmers as a basis for statute preference, but which cases were over ruled in the United States Supreme Court. In 1923 *Potter* v. *Dark Tobacco Growers' Co-operative Association*[30] was decided and held the association valid. The court continues its insistence of the fact that associations are not conspiracies in restraint of trade by their mere structure, but proof must be given of the monopolistic results of its activities. The court said:

There is neither allegation nor proof that a monopoly actually has been created or that the trade has been restrained by the appellee. Hence, it is clear that the contract cannot be annulled as violative of the anti-trust laws neither the Sherman Act nor the common law now in force in this state. . . . .

The underlying public opinion unmistakably demands that the farmers be permitted to organize for the marketing of their crops not merely for their own protection but for the public good. The Wisconsin case and the Kentucky case and the North Carolina case were followed in short order by the Tennessee Court in *Dark Tobacco Growers' Co-operative Association* v. *Mason*,[30a] in which it was said:

The corporation is undoubtedly of impressive size. . . . . But we must adhere to the law and the law does not make mere size an offense or the existence of unexerted power an offence. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible . . . . unless facts are shown which establish that the com-

[30] 201 Kentucky 441, 257 S.W. 53 (1923).
[30a] 150 Tenn. 228, 263 S.W. 60 (1924).

plainant has been guilty of one or more acts inimical in the interests of the public, it cannot be declared an unlawful combination.

We need go no further than to merely cite the cases[31] which have followed unequivocally the rules set down in the preceding cases. The result reached in all of them, practically without exception, has been that where there is a legislative declaration exempting farmers from anti-trust statutes and further allowing farmers and agriculture to combine for the purpose of marketing their products, the mere fact of combination will not in and of its self be a conspiracy in restraint of trade. The standard marketing act enacted in practically every state of the union has been held legal and in the words of Mr. Aaron Sapiro, "it has run the gamut."

It is interesting to note that the Iowa Court in *Clear Lake Co-operative Livestock Shippers Association* v. *Weir*,[32] is exceedingly careful to make its decision, which was favorable to the association involved, based on the fact of additional legislation, which legislation they held to be a declaration of public policy. True, hindsight is far clearer than foresight, but nevertheless we are unable to see why a declaration in an anti-trust statute expressly exempting farmers from its provisions is not just as much a declaration of public policy as a statute subsequently enacted covering the same field. It will be recalled that it was the Iowa Court that decided *Reeves* v. *Decorah* where such powerful adverse language was used.

The success with which the Standard Marketing Act has met has in the majority of states led to additional enactments of "aid statutes." The purpose of these statutes was to give to the associations remedies not usually allowed to other corporations. The theory behind these legislative helps was that the remedy at law was not adequate, that is, for the associations to be successful they cannot rely upon monetary damages. The associations need membership and they must have adequate enforcement processes by which their membership may and can be upheld. As a general rule the forty-two states which now have enacted the standard marketing act have the following provisions to aid the co-operants. First, the statute allowed specifically a provision in the members' contracts for liquidated damages. In attacks

[31] *Hanel* v. *Cane Growers Co-operative Asso.* 16A Ga. 30, 126 S.E. 531; *Minnesota Wheat Growers' Co-operative Asso. v. Huggins,* 162 Minn. 471, 203 N.W. 421; *Warren* v. *Alabama Farmers Bureau Cotton Asso.* 213 Ala. 161, 104 So. 264; *Nebraska Wheat Growers Asso.* v. *Norquest* 113 Neb. 731; *Louisiana Farmers Bureau Cotton Co-operative Asso.* v. *Clark,* 16A La. 294, 107 So. 115; *Manchester Dairy System, Inc.* v. *Hayward* K32A 12; *List* v. *Burley Tobacco Growers' Co-operative Asso.* 114 O.S. 361, 151 N.E. 471; *Rifle Potato Growers' Co-operative Asso.* v. *Smith,* 78 Col. 171, 240 P. 737; *Clear Lake Co-operative Livestock Shippers Asso.* v. *Weir,* 200 Ia. 1293, 206 N.W. 297.

[32] 200 Ia., 1293, 206 N.W. 297.

upon the associations who sought to enforce the contract provision for liquidated damages, the contention has often been made and unsuccessfully so that the liquidated damage clause amounts to a penalty, that a penalty is in the law invalid and consequently no recovery should be allowed. However, the courts have practically uniformly held that where the liquidated damages provided for in the contract is not grossly excessive, such liquidated damages may be recovered as contracted for.[33]

In some states, as in Wisconsin, there is a statutory limit allowing recovery of liquidated damages up to a certain percentage of the value of the crop sold outside the association. Chapter 185.08 sub-section 3 of the Wisconsin Statute provides:

A provision in any such contract determining a specific sum to be paid by the member as liquidated damages for breach of such contract shall be valid, provided that the amount of such liquidated damages does not exceed 30 per cent of the value of the products which are the subject of the breech.

Secondly, the Aid Statute provided as a general rule for specific performance of the contract to sell between member and association. It is well known that at common law there can be no action for specific performance for the sale of personal property save in exceptional cases. However, this remedy and likewise the remedy of injunction, prohibiting the farmers from selling outside of the pool, has been upheld as a valid exercise of the legislative power in legislating for the public good.[34] In some states we have the further remedy of statutory enactment making it a criminal offense for anyone to knowingly interfere with a member's contract. Other statutes give the association the right to recover a statutory amount of damages against any outsider who wittingly obtains delivery of agricultural products from a member under contract with the pool. In Wisconsin we have perhaps the most drastic aid provision of all, namely scction 185.08 sub-section 5 provides in effect the standard contract of members may be recorded in the same manner as chattel mortgages, and that such recording should be notice to the world of the fact that the member named in the contract is bound to deliver his produce to the pool. Further, the statute has its enforcement power in the provision which allows the association to institute replevin proceedings against any one who buys a member's crop after the uniform contract has been recorded. No case on this, to the writer's knowledge, has been de-

---

[33] *Anaheim Citrus Fruit Association* v. *Yeoman,* 51 Cal. App. 759; *Minnesota Co-operative Wheat Growers* v. *Huggins,* 162 Minn. 471, 203 N.W. 420.

[34] *Oregon Growers Co-operative Association* v. *Lenz, Ibid; South Carolina Cotton Growers Asso.* v. *English,* 135 S.C. 19; *Brown* v. *Staple Cotton Co-operative Asso. Ibid.*

cided in the Supreme Court, although in March, 1928, the Northern Wisconsin Co-operative Tobacco Pool instituted proceedings against C. E. Sweeney and Sons of Edgerton to replevy a crop purchased by said defendant in violation of the above mentioned statute. Quoting the *United States Tobacco Journal*[35] dated April 28, 1928, we find:

The Northern Wisconsin Tobacco Pool won a complete victory in the first case brought under the replevin statute by a stipulation settlement in the pools case against C. E. Sweeney & Sons. Stipulation of settlement was filed in the Dana County Circuit Court on April 18.

The final word of the entire problem herewith discussed was handed down by the United States Supreme Court on February 20, 1928, in the case of *Liberty Warehouse Company* v. *Burley Tobacco Growers' Co-operative Marketing Association.*[36] In brief, the case was an action by the association to recover $500 statutory damages against the warehouse company for violation of the statute which read as follows:

Any person or persons or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spreads false reports about the finances or management thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred dollars and not more than one thousand dollars for each such offense, and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars for each such offense.

The answer of the defendant asserts that this section of the Bingham Act conflicts with the Fourteenth Amendment, abridges the defendant's privileges and immunities of the United States; deprives it of corporate life, liberty and property without due processes of law and denies it the equal protection of the law. The answer also sets up that the plaintiff is an unlawful trust or combination in restraint of trade. A court, in answering these contentions says:

Section 1 presents no Federal question. It does not mention the constitution or any statute of the United States, but claims that the association is an unlawful trust or combination under common law rules. But the present controversy concerns a statute and a state may freely alter, amend or abolish the common law within the jurisdiction.

The court then referring to the allegation that the defendant was denied due process of law and equal protection of the law says:

The statute penalizes all who wittingly solicit, persuade or induce an association member to break his marketing contract. It does not prescribe more rigorous penalties for warehouse men than for other offenders. Nobody is permitted to do what is denied to the warehouse

[35] Vol. 109, No. 17.

[36] 48 Sp. Ct. Rept. 291.

men. There is no substantial basis upon which to invoke the equal protection clause.

Connelly v. *Union Sewer Company* is much relied upon, but there the circumstances differ radically from those here presented. . . . . This court held that because of the exemption in the Anti-Trust Statute, the Union Company was denied the equal protection of the law. It was forbidden to do what others could do with impunity. Here the situation is very different. The questioned statute undertakes to protect sanctioned contracts against any interference—no one could lawfully do what the warehouse company did.

At another point in the decision the court continues:

By the opinion generally accepted—and upon reasonable grounds that they give his with the co-operative marketing statute promoted common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the question. This court has recognized as permissible some discrimination intended to encourage agriculture. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the association and its members as of a separate class providing against probable interference therewith and to the extent limit the same time action of warehouse men.

This case, the last word of the United States Supreme Court, seems to definitely settle the proposition herewith discussed.

In conclusion it might be well said that "they who are among the trees do not see the forest." The subject of co-operating marketing and restraint of trade in its various and sundry aspects has not only been a legal proposition but one of volcanic political aspects as well. The changing attitude of the courts of the country is perhaps one of the finest examples of adaptation and crystallization of legal principles to meet an economic situation. Legally it might be said that agricultural co-operation is valid. It does not contravene the anciently accepted idea of monopoly. It does not, in view of the latest decisions, transgress rules against conspiracy in restraint of trade. Its contracts, though exceedingly unique and long litigated, have been upheld and are valid.